

WRIT PETITION NO.4183 OF 2004

Versus

And

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JUDGMENT :

1. Notice for final disposal of the Writ Petition at admission stage was issued on 26th June, 2006. Accordingly, the Writ Petition is taken up for final hearing.

2. By this Writ Petition under Article 227 of the Constitution of India, the Petitioner which is a Municipal Corporation constituted under the Bombay Provincial Municipal Corporation Act, 1949 (hereinafter referred to as the said Act) has taken an exception to order dated 14th October, 2003 passed by the learned Civil Judge, Senior Division, Thane. The said order was passed in an Appeal preferred by the Respondent under section 406 of the said Act by which the Respondent challenged the order of assessment dated 12th July, 2003 passed by the Petitioner-Corporation.

3. Under Chapter XIA of the said Act, a Municipal Corporation is empowered to levy Cess in lieu of octroi. On 12th July, 2003, the Deputy Commissioner of the Petitioner-Corporation passed an order holding that a sum of Rs.94,60,403/- was payable by the Respondent by way of Cess, interest thereon and penalty. The Respondent invoked provisions of Section 406 of the said Act and preferred an Appeal before "the Judge" as defined under the said Act. The Civil Judge, Senior Division is the Judge within the meaning of the said Act. An Application was made under Rules 1 and 2 of Order XXXIX of the Code of Civil Procedure, 1908 by the Respondent in the pending Appeal for

preventing implementation of the order dated 12th July, 2003 passed by the Deputy Commissioner of the Petitioner. By the impugned order, the learned Judge stayed the implementation and operation of the order dated 12th July, 2003 till the disposal of the Appeal.

4. The submission of the learned counsel for the Petitioner is that the deposit of the amount of demand was a condition precedent for entertaining the Appeal preferred by the Respondent. He submitted that the Appeal could not have been entertained unless the amount demanded under order dated 12th July, 2003 was deposited by the Respondent. He submitted that there is no power vesting in the learned Judge to stay the operation and execution of the said order. The learned counsel appearing for the Respondent submitted that considering the huge amount of demand made by the Petitioner, the learned trial Judge was justified in granting interim relief. He placed reliance on a decision of the learned single Judge of this Court in the case of **Municipal Corporation of City of Pune Vs. Shri Haridas Govindas Gujrati (2002(2) ALL MR Page 913)**. He also placed reliance on a decision of the Apex Court in the case of **Sangfroid Remedies Ltd Vs. Union of India (1998(103) E.L.T. 5 (S.C.))**. He also placed reliance on order dated 06th October, 1994

passed by the Apex Court in a Special Leave Petition in the case of **M/s.Surendra Industries Pvt Ltd Vs. Municipal Corporation of City of Thane**. He submitted that no interference was called for with the impugned order.

5. I have considered the submissions. It is possible to say that the cess recovered by the Petitioner under Chapter XIA of the said Act is a tax in as much as section 152A of the said Act provides that the cess will be in lieu of octroi. Sub-section 1 and sub-section 2 of section 406 read thus:

"406. Appeals when and to whom to lie.

(1) Subject to the provisions hereinafter contained, appeals against any rateable value or tax fixed or charged under this Act shall be heard and determined by the judge.

(2) No such appeal [shall be entertained] unless-

(a) it is brought within fifteen days after the accrual of the cause of complaint;

(b) in the case of an appeal against a rateable value a complaint has previously been made to the Commissioner as provided under this Act and such complaint has been disposed of.

(c) in the case of an appeal against any tax in respect of which provision exists under this Act for a complaint to be made to the Commissioner against the demand, such complaint has previously been made and disposed of.

(d) in the case of an appeal against any amendment made in the assessment book for property taxes during the official year, a complaint has been made by the person aggrieved within fifteen days after he first received notice of such amendment, and his complaint has been disposed of.

(e) in the case of an appeal

against a tax, or in the case of an appeal made against a rateable value [the amount of the disputed tax claimed from the appellant or the amount of the tax chargeable on the basis of the disputed rateable value, upto the amount of the tax chargeable on the basis of the disputed rateable value, upto the date of filing, the appeal has been deposited by the appellant with the Commissioner.]"

6. Under clause (e) of sub-section 2 of section 406, in the case of an Appeal against a tax, the amount of disputed tax claimed from an Appellant is required to be deposited with the Commissioner. Infact, the deposit of the said amount is a condition precedent for entertaining the Appeal. Perusal of the order dated 12th July, 2003 passed by the Deputy Commissioner shows that by the said order, the demand is for balance Cess amount of Rs.67,45,944/-. A sum of Rs.25,63,449/- is the interest charged under Rule 41(3)(b). A sum of Rs.01,50,000/- is the penalty.

7. The learned trial Judge has completely ignored the mandatory requirement of clause (e) of sub-section

2 of section 406. In fact, without the Respondent depositing the amount of disputed tax, the learned Judge ought not to have entertained the Appeal. It is pertinent to note that the learned Judge has referred to clause (e) of sub-section 2 of section 406. The learned Judge has thereafter referred to order of the Apex Court in the case of M/s.Surendra Industries Pvt. Ltd. (supra) wherein the Apex Court granted stay of recovery of the tax to the extent of one half of the tax amount as assessed. The learned counsel for the Petitioner pointed out that the Special Leave Petition preferred before the Apex Court in the case of M/s.Surendra Industries Pvt Ltd (supra) arose out of an order passed in First Appeal filed in this Court. He pointed out that the First Appeal arose out of a civil suit. He pointed out that the matter before the Apex Court did not arise out of an Appeal under section 406 of the said Act. I have perused the orders passed by the Apex Court. The said orders of the Apex Court cannot be read as an authority for the proposition that the Judge has a power to dispense with the requirement of deposit under clause (e) of sub-section 2 of section 406. Infact, the orders of the Apex Court are passed in the facts of the case before it. The learned counsel for the Respondent has also placed reliance on the decision of the learned

single Judge in the case of Municipal Corporation in the City of Pune (supra). This judgment again does not deal with interpretation of clause (e). Same is the case with the decision of the Apex Court in the case of Sangfroid Remedies Ltd (supra).

8. As a result of the impugned order, clause (e) of sub-section 2 of section 406 stands completely defeated. The order impugned is contrary to the express provisions of the said Act. The order is patently illegal and the same deserves to be set aside. However, time deserves to be granted to the Respondent to comply with the requirement of deposit. On the failure to comply with the requirement of deposit, the Appeal preferred by the Respondent will stand dismissed.

9. Hence, I pass the following order:

(i) The impugned Judgment and Order dated 14th October, 2003 passed below Application at Exhibit 5 in Municipal Appeal No.16 of 2003 is quashed and set aside and the Application at Exhibit 5 stands rejected.

(ii) If the Respondent fails to comply with the

mandatory requirement of clause (e) of sub-section 2 of section 406 of the said Act within a period of twelve weeks from today, the Municipal Appeal No.16 of 2003 will stand dismissed.

- (iii) If the compliance is made as aforesaid, the trial Court will decide the Appeal as expeditiously as possible and preferably within a period of six months from the date of deposit.
- (iv) All contentions of the parties as regards illegality of the impugned demand are expressly kept open.
- (v) Writ Petition is allowed in above terms with no orders as to costs.

JUDGE